Supreme Court, U.S.
FILED
SEP 8 2003
OFFICE OF THE CLERK

Nos. 02-1238, 02-1386 and 02-1405

In the Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

SOUTHWESTERN BELL TELEPHONE, L.P., FKA SOUTHWESTERN BELL TELPHONE COMPANY, PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether 47 U.S.C. 253(a), which provides that "[n]o State * * * regulation * * * may prohibit * * * the ability of any entity to provide any interstate or intrastate telecommunications service," preempts a state law prohibiting political subdivisions of the State from offering telecommunications service to the public.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America. The State of Missouri, which intervened in the court of appeals, separately filed a petition. Southwestern Bell Telephone, L.P., fka Southwestern Bell Telephone Company, also intervened below and separately filed a petition. The Missouri Municipal League, Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Sikeston, Missouri, Columbia Water & Light, and the American Public Power Association were the petitioners in the court of appeals, and are the respondents here. The National Association of Telecommunications Officers and Advisors and the United Telecom Council participated as amici in the court of appeals.

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No. 02-1238

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, PETITIONER

v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 299 F.3d 949. The decision of the Federal Communications Commission (Pet. App. 14a-45a) is reported at 16 F.C.C.R. 1157.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2002. Petitions for rehearing were denied on November 20, 2002. Pet. App. 46a. On February 10, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari in Nos. 02-1386 and 02-1405 to and including March 20, 2003. The petition for a writ of certiorari in No. 02-1238 was filed on February 18, 2003. The petitions for a writ of certiorari in Nos. 02-1386 and 02-1405 were filed on March 20, 2003. The Court granted the petitions for a writ of certiorari and consolidated the three cases on June 23, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253 of the federal Communications Act of 1934, 47 U.S.C. 253, and Section 392.410(7) of Vernon's Annotated Missouri Statutes (West Supp. 2003), are reprinted at Pet. App. 47a-49a.

STATEMENT

1. For most of the twentieth century, the provision of local telephone service in the United States "was thought to be a natural monopoly," and "States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC)." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress sought to end that "longstanding regime of state-sanctioned monopolies," *ibid.*, when it enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, and "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 638 (2002).

The provision of the 1996 Act at issue in this case, 47 U.S.C. 253(a), furthers the statute's design of fostering competition in local markets by abolishing all state exclusive-franchise laws. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The statute further provides that "[i]f * * * the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) * * *, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. 253(d). The Federal Communications Commission (FCC or Commission) has executed that directive by, for example, preempting the enforcement of a state statute that shielded rural incumbent telephone carriers from competition from other private providers of local telephone service. See *Silver Star Tele. Co.*, 12 F.C.C.R. 15,639 (1997), recons. denied, 13 F.C.C.R. 16,356 (1998), aff'd *sub nom. RT Communications, Inc.* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000).

2. This case arises on review of an FCC decision finding that Section 253(a) does not preempt a Missouri statute that prohibits the State's political subdivisions from providing telecommunications services. The FCC's decision relied heavily on an earlier decision involving a similar Texas statute. In *In re Public Utility Commission*, 13 F.C.C.R. 3460 (1997), the FCC addressed a petition by Texas municipalities (but not municipally owned utilities) that urged the Commission to use its authority under Section 253(d) to hold pre-

empted a number of provisions of Texas law that were alleged to violate Section 253(a). One challenged provision "generally prohibit[ed] municipalities or municipally-owned electric utilities from offering for sale, directly or indirectly, certain telecommunications services." 13 F.C.C.R. at 3540. Limiting its ruling to the application of the state statute to municipalities themselves (rather than municipally owned utilities), *id.* at 3544, the Commission found that "preempting the enforcement of [the challenged provision] would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Ibid.*

The Commission explained that the challenged law "is an exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions," and that this Court's decision in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), held that such "fundamental state decisions" remain within the State's authority "absent a clear indication of intent." 13 F.C.C.R. at 3545-3546. In reaching that conclusion, the Commission distinguished "the question of whether federal standards may be applied to an arm of a Texas municipality," which would not be subject to the *Gregory* rule, from the question whether the State may "define the scope of the authority delegated to a state's own political subdivisions," which is subject to the *Gregory* rule. *Id.* at 3546. Applying that rule to Section 253(a), the Commission was unable to find that the use of the term "any entity" in Section 253(a) constituted a sufficiently clear statement that Congress specifically intended to include municipalities within the scope of Section 253(a) preemption and thereby intrude into the scope of authority that a State may

delegate to its own political subdivisions. *Id.* at 3546-3549.

Although ruling that the Texas statute was not preempted, the Commission "encourage[d] states to avoid enacting absolute prohibitions on municipal entry into telecommunications," because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." 13 F.C.C.R. at 3549. The Commission acknowledged "that entry by municipalities * * * may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias." *Ibid.* But the Commission stated its belief "that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry." *Ibid.*

In *City of Abilene* v. *FCC*, 164 F.3d 49 (1999), the D.C. Circuit affirmed the FCC's decision concerning the Texas law. The court agreed with the FCC that "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory* v. *Ashcroft*," because "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty." *Id.* at 52. The court accordingly held that it must "be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services" before Section 253(a) may be applied to do so. *Ibid.* The D.C. Circuit concluded that "it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category 'any entity.'" *Id.* at 54. Accordingly, the D.C. Circuit agreed with the Commission that Section 253(a) does not preempt the Texas statute.

3. This case involves a Missouri statute similar to the statute at issue in *City of Abilene*. The Missouri statute provides that "[n]o political subdivision of this state shall provide or offer for sale * * * a telecommunications service," with exceptions for, inter alia, "Internet-type services." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003).[1] Like the state law at issue in the Texas proceedings, the Missouri law does not purport to prohibit or limit the ability of private companies to provide telecommunications services on a competitive basis. A number of Missouri municipalities, municipal organizations, and municipally owned utilities filed a petition with the FCC seeking an order declaring that the Missouri statute is preempted under Section 253(a).

The FCC denied the petition. Pet. App. 14a-45a. Relying on its own decision in the Texas case and the D.C. Circuit's subsequent affirmance in *City of Abilene*, the Commission noted that the case presented "a fundamental issue concerning the relationship between a state and its political subdivisions." *Id.* at 27a. The Commission accordingly again applied the *Gregory* plain statement rule. *Id.* at 19a. As in the Texas proceeding, the Commission was unable to conclude that either the use of the term "any entity" in Section 253(a) or the legislative history of Section 253(a) is sufficient to make clear Congress's intent to preempt the State's authority to control its political subdivisions. *Id.* at 29a-30a ("any entity"), 35a-37a (legislative history). Accordingly, the Commission concluded that "the term 'any entity' in section 253(a) of the Act was not

[1] The statute as originally enacted was scheduled to expire in August 2002. 1997 Mo. Legis. Serv. H.B. 620 (West). The Missouri General Assembly subsequently extended the statute's effectiveness until August 2007. 2002 Mo. Legis. Serv. H.B. 1402 (West).

intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation." *Id.* at 22a. The Commission generally extended that ruling to municipally owned utilities because it found no evidence "that municipally-owned utilities are not considered to be political subdivisions in Missouri." *Id.* at 32a-33a. The Commission noted, however, that "if a municipally-owned utility sought to provide telecommunications service or facilities as an independent corporate entity that is separate from the state, [the Commission] could reach a different result under section 253(a)." *Id.* at 38a.

Although it held the Missouri statute not preempted, the Commission again urged, as a policy matter, "that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service," because "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." Pet. App. 23a; see *id.* at 42a-43a (separate statement of Chairman William E. Kennard and Commissioner Gloria Tristani), 43a-44a (separate statement of Commissioner Susan Ness).

4. The Eighth Circuit reversed the FCC's determination that Section 253(a) does not preempt the Missouri statute. Pet. App. 1a-13a. The court of appeals, like the Commission, held that the plain statement rule of *Gregory* v. *Ashcroft* "applies in this case," and "requires [the court] to determine whether the statutory language plainly requires preemption." *Id.* at 6a, 7a. The court disagreed, however, with the Commission's application of that rule to the term "any entity" in Section 253(a).

The court held that "the words 'any entity' plainly include municipalities and so satisfy the *Gregory* plain-statement rule." Pet. App. 7a. The court noted that municipalities fall within the ordinary definition of the term "entity," *id.* at 8a (citing *Black's Law Dictionary* 553 (7th ed. 1999)), and asserted that the appearance of the modifier "any" "signifies [Congress's] intention to include within the statute all things that could be considered entities," *id.* at 8a-9a. For that proposition, the court relied principally on *Salinas* v. *United States*, 522 U.S. 52 (1997). In *Salinas*, this Court held that the federal bribery statute, which prohibits acceptance of bribes "in connection with any business transaction" by an agent of any organization that receives federal funds, does not require proof that the bribe had an effect on the federal funds. *Id.* at 56-57. In reaching that conclusion, the Court stated that "[t]he plain-statement requirement articulated in *Gregory* * * * does not warrant a departure from the statute's terms," because "[t]he text [of the federal bribery statute] is unambiguous on the point under consideration here." *Id.* at 60. In the Eighth Circuit's view, "*Salinas* held that by using the clearly expansive term 'any,' Congress expressed its intent to alter th[e] [federal-state] relationship." Pet. App. 12a.

Having concluded that Section 253(a) does operate to preempt state laws like the one in this case, the court of appeals vacated the FCC's decision and remanded the case to the agency for further proceedings. Pet. App. 13a.

SUMMARY OF ARGUMENT

A. It is common ground that 47 U.S.C. 253(a), which preempts state laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any

interstate or intrastate telecommunications service," applies to state laws that regulate entry by private firms into the telecommunications market. The question presented is whether it also preempts state laws that limit or prohibit the State's own political subdivisions from providing telecommunications service. The court of appeals in this case, as well as each of the other courts that has addressed that question, has concluded that it is governed by the clear statement rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). That conclusion is correct.

If Section 253(a) were construed to preempt state laws that allocate authority to political subdivisions, it would interfere with a fundamental aspect of state sovereignty. It is "[t]hrough the structure of its government" that "a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. A State's ability to structure its government, and to allocate—or not allocate—authority to its political subdivisions to perform whatever functions it deems appropriate, is therefore a fundamental feature of state sovereignty. Congress does not ordinarily intend to interfere with state authority in areas that are so central to state self-government. Accordingly, Section 253(a) cannot be construed to have that effect unless it can be concluded with certainty that Congress so intended.

B. In applying the *Gregory* rule, the crucial question is whether it can be concluded, from the terms, structure, or context of the federal law, not merely that Congress intended to achieve a general federal policy, but also that Congress considered the intrusive effect that application of the general federal policy would have on state sovereignty and intended that effect. No such conclusion can be drawn about Section 253(a).

Section 253(a) was intended to eliminate the old system of state regulation of the telecommunications marketplace by means of exclusive-franchise laws. Section 253(a) can therefore be given its intended effect by applying it to preempt state and local laws limiting the entry of private firms into that market. Nothing in the terms, structure, or context of Section 253(a) suggests that Congress intended to reach beyond preemption of such state and local regulatory authority. Accordingly, nothing in Section 253(a) suggests that Congress contemplated, or intended to authorize, an intrusion on the States' ability to structure their government—including their political subdivisions—as they desired.

This Court's cases support that conclusion. Those cases reveal that, where a federal statute is explicitly directed at state action that may have an effect on important sovereign functions, the *Gregory* rule is satisfied. By contrast, where Congress's intent to intrude into state sovereignty is unclear, the *Gregory* rule is not satisfied. This case falls within the latter class, because Section 253(a) was clearly directed at state regulatory authority over market entry by private firms, not the ability of a State to structure its own government and that of its political subdivisions.

C. The court of appeals recognized that the *Gregory* rule applies, but that court held that the *Gregory* rule is satisfied because Section 253(a) preempts state laws prohibiting "any entity" from providing telecommunication services. The term "any entity," however, does not provide the necessary assurance under *Gregory* that Congress considered and intended the intrusion on state sovereignty that would occur if Section 253(a) were construed to apply to a State's allocation of authority to its subdivisions.

Although this Court has noted in other cases that the term "any" in other statutes may have an expansive meaning, most of those cases did not involve a clear statement rule that governed the statutory interpretation. And none of those cases involved a federal statute that threatened the kind of serious inroad on an area central to state sovereignty that could be caused by applying Section 253(a) to limit a State's ability to decide on the proper allocation of authority to its political subdivisions. Indeed, in an analogous context to this case, the Court in *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002), found that the use of the term "any" was *not* sufficient to satisfy a clear-statement rule and require a broad interpretation of a federal statute. Similarly, the mere use of the phrase "any entity" in Section 253(a), a statute primarily directed toward state and local regulation of private firms, does not make clear that Congress considered or intended that the statute have effects that would intrude deeply on state sovereignty. Accordingly, under the *Gregory* rule, Section 253(a) may not be construed to have such effects.

ARGUMENT

MISSOURI'S STATUTE PRECLUDING THE STATE'S POLITICAL SUBDIVISIONS FROM OFFERING TELECOMMUNICATIONS SERVICE IS NOT PREEMPTED UNDER 47 U.S.C. 253(a)

A. Section 253(a) Does Not Preempt A State Law Allocating Authority To The State's Political Subdivisions Unless It Can Be Shown That Congress's Intent To Preempt Such Laws Is Clear Under The Rule Of *Gregory* v. *Ashcroft*

Under 47 U.S.C. 253(a), state laws that "prohibit or have the effect of prohibiting the ability of any entity to

provide any interstate or intrastate telecommunications service" are preempted. 47 U.S.C. 253(a). There is no dispute that Section 253(a) opens up competition in the provision of telecommunications service by preempting state laws that prohibit private firms from providing telecommunications service and thereby keep new entrants from participating in the telecommunications market. The question presented in this case is whether Section 253(a) should also be construed to preempt state laws that prohibit a State's political subdivisions from providing telecommunications service.

Each of the courts that has addressed the question whether Section 253(a) preempts state laws that prohibit political subdivisions from providing telecommunications service has concluded that that question is governed by the plain statement rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). The Eighth Circuit so concluded in this case. Pet. App. 6a ("A second plain-language standard also applies in this case. The Supreme Court requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states.") (citing *Gregory*). The D.C. Circuit reached the same conclusion in *City of Abilene*. See 164 F.3d at 52 ("§ 253(a) must be construed in compliance with the precepts laid down in *Gregory* v. *Ashcroft*."). The other courts that have addressed the question have agreed.[2]

[2] See *City of Bristol* v. *Early*, 145 F. Supp. 2d 741, 747 (W.D. Va. 2001) (citing *Gregory* and noting that "[t]he question, then, is whether § 253(a) demonstrates a 'clear and manifest' intention by Congress to preempt state laws" that prohibit a municipality from providing a telecommunications service); *In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 371 (Neb.) (stating that "we are persuaded by the reasoning of the Eighth Circuit" in the instant case), cert. denied, 123 S. Ct. 2620 (2003); *Iowa Tel. Ass'n* v. *City of Hawarden*, 589 N.W.2d 245, 251-252 (Iowa 1999) (noting that *City of Abilene* had stated that "Congress's intent to include municipalities in the category of 'any entity' was not plain as required by *Gregory*" and stating that "[w]e agree with this interpretation of § 253(a)") (internal quotation marks omitted); *Municipal Elec. Auth.* v. *Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399, 403 (Ga. Ct. App. 1999) (citing *Gregory* and stating that "[w]ithout * * * a clear expression of congressional intent, the Federal Telecommunications Act does not preempt" a state administrative agency's order barring a municipal electric authority from providing telecommunications service).

The FCC likewise reached that conclusion. Pet. App. 19a, 26a-27a; see also *In re Public Util. Comm'n*, 13 F.C.C.R. at 3545-3546. Respondents have not disagreed with that conclusion or argued to the contrary. See Br. in Opp. 2; see also Resp. C.A. Br. 30 ("[a]ssuming" that *Gregory* applies and making no argument to the contrary).

That view is correct. *Gregory* involved the application of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, to a state constitutional provision setting a retirement age for appointed state judges. The Court recognized each "State's constitutional responsibility for the establishment and operation of its own government," 501 U.S. at 462, and explained that "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. A State's ability to define its governmental structure in that way is "of the most fundamental sort for a sovereign entity," and "Congressional interference with this decision of the people of [the State] * * * would upset the usual constitutional balance of federal and state powers." *Ibid.* Accordingly, "it is incumbent upon the federal courts to be certain of Congress' intent

before finding that federal law overrides this balance." *Ibid.* (internal quotation marks omitted). That clear statement rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

That plain statement rule is equally applicable here. A State's determination of which political subdivisions to create and what powers to allocate to them, like its determination of the qualifications of its judges, is a matter that goes to "the structure of its government." *Gregory*, 501 U.S. at 460. Political subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002), and the "number, nature and duration of the powers conferred upon [them] * * * rests in the absolute discretion of the State," *Sailors* v. *Board of Education*, 387 U.S. 105, 108 (1967). Accord *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607-608 (1991); *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178-179 (1907) ("The state, therefore, at its pleasure, may modify or withdraw all such powers, * * * expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 629-630 (1819).

"Whether and how" a State uses its discretion in allocating powers to its political subdivisions therefore "is a question central to state self-government." *City of Columbus*, 536 U.S. at 437. As in *Gregory*, it "goes

beyond an area traditionally *regulated* by the States." *Gregory*, 501 U.S. at 460 (emphasis added); see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995). Instead, it is a part of the way in which "a State defines itself as a sovereign" and is "a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. Because Congress "does not readily interfere" with a State's fundamental determinations of how to organize and allocate its powers, courts should not lightly construe federal statutes to do so. *Id.* at 461. Rather, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" such fundamental state determinations. *Id.* at 460. The *Gregory* clear statement rule accordingly must be applied to determine whether Section 253(a) preempts a state law that denies the State's political subdivisions the authority to provide telecommunications service.

B. Section 253(a) Does Not Manifest A Clear Intent To Preempt State Laws Allocating Authority To Political Subdivisions Of A State

The role of the *Gregory* clear statement principle is to "assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002) (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). That does not mean that, when the question arises whether a federal law applies to a State in an area fundamental to its sovereignty, the federal law "must mention" the particular application "explicitly" in order to apply. *Gregory*, 501 U.S. at 467. It does mean, however, that the federal law should not be construed to apply unless it can be concluded, from the terms,

structure, or context of the federal law, that Congress intended not merely to achieve a general federal policy, but also to do so even at the cost of a possible effect on an area central to state self-government. As applied here, it cannot be concluded from the terms, structure, or context of Section 253(a) that Congress intended such an effect. Accordingly, Section 253(a) leaves to the States the structure of state government and the allocation of power among state political subdivisions.

1. Section 253(a) can be given its intended effect by construing it to preempt state and local regulatory actions that restrict entry by private firms into the telecommunications marketplace, while leaving unaffected the fundamental sovereign prerogative of the States to structure state government and allocate power to political subdivisions as they find appropriate. Prior to the 1996 Act, "local phone service was thought to be a natural monopoly," and States "typically granted an exclusive franchise in each local service area to a local exchange carrier." *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act, however, "rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets." *In re Public Util. Comm'n*, 13 F.C.C.R. 3460, 3461 (1997). Thus, a central goal of the 1996 Act as a whole was to stimulate "*private sector* deployment" of advanced telecommunications and information technologies and services. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

Section 253(a) was enacted to achieve that goal, by eliminating state and local laws that prohibited "any entity" from entering the telecommunications market

to compete with the incumbent local telephone company. In light of Congress's desire to eliminate the exclusive-franchise system, there was no reason to permit States to limit new entrants to those with a particular corporate form or structure or otherwise to impose unreasonable requirements on entrants into the marketplace. Cf. 47 U.S.C. 253(b) (preserving "competitively neutral" state laws that, *inter alia*, "protect the public safety and welfare"). Section 253(a) was accordingly worded broadly to accomplish the goal of ending "the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T*, 525 U.S. at 405 (Thomas, J., concurring in part and dissenting in part). Regardless of whether it extends to preempt state laws allocating or withdrawing power from political subdivisions, Section 253(a) serves its intended goal by preempting state and local regulations that preserve the old exclusive-franchise system or otherwise prohibit private firms from providing telecommunications service. See, *e.g.*, *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160, 1170 (9th Cir. 2001) (Section 253 "prohibits state and local governments from creating 'barriers to entry,' legal requirements that prohibit or have the effect of prohibiting a company from providing telecommunications service."), cert. denied, 534 U.S. 1079 (2002); *RT Communications, Inc.* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000) (upholding FCC determination that Section 253(a) preempts state law shielding rural incumbent telecommunications providers from competition by other private firms); *Cablevision of Boston, Inc.* v. *Public Improvement Comm'n*, 184 F.3d 88, 97-98 (1st Cir. 1999) (discussing purpose of Section 253(a)).

Congress's decision in Section 253(a) to open up the telecommunications market to new entrants, however,

did not require it to "in fact face[], and * * * bring into issue, the critical matters involved," *Raygor*, 534 U.S. at 544, in intruding upon a State's discretionary determinations of how to structure itself and its political subdivisions. There is no indication in the language or structure of Section 253(a) or elsewhere in the 1996 Act that Congress in fact intended to take the unusual step of interfering in a State's internal allocation of authority among itself and its political subdivisions. Accordingly, while Section 253(a) is appropriately construed to preempt a wide array of regulations that would limit the ability of competing firms to provide telecommunications service, the *Gregory* clear statement rule precludes an interpretation that would invalidate the traditional discretion enjoyed by States in allocating authority among their political subdivisions.[3]

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[3] If it were concluded that Section 253(a) preempted state laws that limited the ability of their subdivisions to provide telecommunications service, the application of Section 253(a) would likely turn on matters of form that have nothing to do with Congress's purposes in the 1996 Act. Although there are wide variations in the ways in which States confer and limit the power of political subdivisions, an important distinction is between general-law and home-rule municipalities. As the Court has explained, "[i]n contrast to a general-law city, a home-rule city has authority to do whatever is not specifically prohibited by the State." *City of Lockhart* v. *United States*, 460 U.S. 125, 127 (1983). If the municipality is a general-law jurisdiction, then it would appear that the State could easily preclude a city from providing telecommunications service simply by not affirmatively providing it with authority to do so; a State's *refusal* to pass a law could not comfortably be construed as a "statute or regulation" or "requirement," and it therefore would not likely be subject to preemption under Section 253(a), even as construed by the court of appeals in this case. On the other hand, if the municipality were a home-rule jurisdiction, an affirmative act by the State could be necessary to preclude the city from providing telecommunications service, and preemption of such a law under Section 253(a) would be triggered under the court of appeals' interpretation of the statute. There is no reason to believe that Congress intended the application of Section 253(a) to turn on differences in the form a State has used in creating a particular political subdivision.

2. The conclusion that Section 253(a) does not manifest a clear intent to preempt state laws delineating the authority of political subdivisions is supported by this Court's other cases applying the *Gregory* rule. The Court has held that federal laws are sufficiently clear to satisfy *Gregory* in cases in which the federal law plainly indicates that Congress intended it to apply to the States even if such application would affect core sovereign concerns. On the other hand, the Court has held that the *Gregory* rule is not satisfied where it was not clear that Congress considered or intended the intrusions on state sovereignty that would follow from an expansive application of the federal law.

For example, *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), presented the question whether Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, which prohibits a "public entity" from discriminating against individuals with disabilities, applied to discrimination by state prisons against prisoners. The term "public entity" was defined to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* at 210 (quoting 42 U.S.C. 12131(1)(B)). The Court assumed that the *Gregory* rule controlled the question whether the ADA applied to state prisons and prisoners, but held that the statutory language satisfied that rule and therefore that the statute "unmistakably includes State prisons and prisoners within its coverage." *Id.* at 209.

Although Congress had not explicity mentioned state prisons or prisoners in the ADA, the terms of the ADA made clear that the statute was specifically intended to govern state governments in their relations to private parties. That made clear that Congress had considered and authorized whatever incursions on state sovereignty followed, and the *Gregory* principle was therefore satisfied.

Yeskey may usefully be contrasted with *Gregory* itself. In *Gregory*, the ADEA generally covered state employees, and it thereby demonstrated Congress's intent to that extent to regulate the qualifications of state employees. But the ADEA contained an exception excluding from its coverage an elected official, "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office," and an "appointee on the policymaking level." See *Gregory*, 501 U.S. at 465. As the Court explained, "[i]n the context of a statute that plainly excludes most important state public officials, 'appointee on the policymaking level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges." *Id.* at 467. Although Congress in the ADEA had plainly intended to regulate the qualifications of state employees generally, it had also indicated that it did not want to regulate the qualifications of the top rank of state officials, whose qualifications were of most central importance to state sovereignty. Thus, examining the statute as a whole, the Court could not conclude that Congress had "in fact face[d], and * * * br[ought] into issue, the critical matters involved" in regulating the job qualifications of appointed state judges under the ADEA. *Raygor*, 534 U.S. at 544. Accordingly, the Court concluded that the ADEA did not apply to appointed state judges. *Gregory*, 501 U.S. at 467.

As in *Gregory*—but unlike in *Yeskey*—Section 253(a) does not provide any indication that Congress specifically considered and intended to authorize any special intrusion on state sovereignty. Accordingly, Section 253(a) should not be construed to have that effect. The Commission's interpretation of Section 253(a) should instead be upheld, because it avoids trenching upon a State's ability to delineate the scope of authority possessed by its subdivisions.

C. Congress's Use Of The Term "Any Entity" In Section 253(a) Does Not Show That It Intended The Statute To Regulate A State's Allocation Of Authority To Its Subdivisions

While recognizing that the *Gregory* rule applies, the court of appeals held that "the words 'any entity' [in Section 253(a)] plainly include municipalities and so satisfy the *Gregory* plain statement rule." Pet. App. 7a. That conclusion is incorrect. As argued above, the phrase "any entity" indicates only that Congress intended Section 253(a) generally to eliminate state exclusive-franchise and similar laws. That phrase does not indicate that Congress gave any attention to the intrusion on state sovereignty that would result from preemption of state laws concerning the proper allocation of authority to political subdivisions. Accordingly, the use of "any entity" in Section 253(a) does not plainly show that Congress intended to preempt state laws such as the one at issue in this case.

1. In holding that the phrase "any entity" is sufficient to constitute a plain statement by Congress that it intended to preempt state laws that allocate authority to its political subdivisions, the court of appeals placed principal weight on this Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997). See Pet. App. 6a-7a, 10a-11a. That case, however, is inapposite.

In *Salinas*, the Court held that a federal bribery statute precluding the acceptance of a bribe "in connection with *any* business [or] transaction" of a government agency applies to bribes of local government officials that had no effect on federal funds. 522 U.S. at 57 (emphasis added). In reaching the conclusion that the scope of the bribery statute was sufficiently clear, *id.* at 59-60 (citing *Gregory*), the Court relied not simply on the term "any," but also on the other terms of the statute, see *ibid.*, and on the enactment of amendments to the statute that would have made a narrower construction "incongruous," *id.* at 58-59. In Section 253(a), however, Congress used the term "any" in an entirely different context, surrounded by entirely different statutory language and as the result of a different process of amendment than in *Salinas*. Conclusions about the breadth of the statute at issue in *Salinas* therefore are not applicable to the very different statute at issue here.

Moreover, the bribery statute in *Salinas* did not implicate the full scope of the *Gregory* rule. None of the proffered interpretations of the federal bribery statute at issue in *Salinas* would have placed any limits on a State's ability to control the structure of government for the people of the State—an issue that is "central to state self-government." *City of Columbus*, 536 U.S. at 437. By contrast, if Section 253(a) preempted state laws that prohibited a State's political subdivisions from providing telecommunications service, it would implicate a State's basic decisions about allocation of governmental power. See pp. 14-15, *supra*. Accordingly, the *Gregory* clear statement rule applies with full force in this case, unlike in *Salinas*.

2. The court of appeals' reliance on *Salinas* was further undermined by this Court's recent decision in

Raygor, which was not cited or discussed by the court of appeals. *Raygor* reinforces the conclusion that the use of a modifier such as "any" is not sufficient in itself to satisfy the *Gregory* plain statement standard. Like *Gregory* and this case, *Raygor* involved a matter that goes to the heart of state sovereignty—the power to limit claims brought against the State in the State's own courts. Specifically, *Raygor* concerned a federal statute, 28 U.S.C. 1367(d), that provides for the tolling of a state statute of limitations "for any claim" filed under a federal court's supplemental jurisdiction that ultimately is dismissed by the court. The question presented was whether the tolling provision applies when the federal court dismisses a claim on Eleventh Amendment grounds.

Applying *Gregory*, the Court in *Raygor* held that the statute's reference to "any claim" did not apply to claims against nonconsenting States that were dismissed on Eleventh Amendment grounds. 534 U.S. at 542-546. Although noting that the language of the federal statute, including the terms "any claim," did not clearly exclude tolling for such claims, the Court emphasized that "we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Id.* at 546 (citing *Gregory*, 501 U.S. at 467). *Raygor* thus contradicts the court of appeals' determination (Pet. App. 12a) "that * * * the clearly expansive term 'any'" in a statute implicating core state sovereignty interests is sufficient to demonstrate that Congress intended the statute to apply in areas going to the heart of state sovereignty. Cf. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985) (applying a clear statement rule to conclude that a statute providing remedies against "*any* recipient of Federal assistance" was insufficient to permit suit against a state

agency that received federal funds). Although the phrase "any entity" in Section 253(a) may not expressly *exclude* political subdivisions of a State, the inquiry under *Gregory* requires a showing that Congress specifically intended to *include* political subdivisions before the statute could be applied to them. There is nothing in Section 253(a) that could support such a showing.[4]

3. The other cases relied on by the court of appeals for the proposition that "the modifier 'any' prohibits a narrowing construction of a statute," Pet. App. 9a, also do not support its conclusion. It is true that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997). The term "any" therefore can be a useful guidepost in the ordinary process of statutory construction. See Pet. App. 9a-10a (citing cases). That fact, however, does not resolve the question in this case.

The premise of the *Gregory* rule is that "federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units." *City of Columbus*, 536 U.S. at 440. Accordingly, as the D.C.

[4] The term "entity," too, may "bear[] different meanings depending on the context." *Southern Co. Servs.*. v. *FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002). For example, the court in *Southern Services* concluded that provisions of the 1996 Act involving pole attachments used the term "entity" at times to include only entities that make attachments to the poles of others and at times to include both the pole owner and the attaching entity. *Ibid.* The use of that term in Section 253(a) accordingly cannot be taken to be a plain statement that Congress intended to include political subdivisions of a State—especially when the effect of such an inclusion would be to interfere with the State's determination of what powers it will confer upon its political subdivisions.

Circuit correctly recognized in *City of Abilene*, it is "not enough" to satisfy *Gregory* that Section 253(a) "could" apply to state laws allocating authority to the State's political subdivisions. 164 F.3d at 52-53. The plain statement rule requires something more to show "that in using the word 'entity,' Congress deliberated over the effect this would have on State-local government relationships," or that "it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business." *Id.* at 53. The mere use of the terms "any entity" in Section 253(a), a statute directed toward state and local regulation of private firms, does not make clear that Congress considered or intended that the statute have any such effect. Accordingly, the use of those terms in Section 253(a) is insufficient to satisfy the *Gregory* clear statement rule.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2003